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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ACE/CLEARDEFENSE, INC.,
Petitioner,

v.

CLEAR DEFENSE, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED

Contrary to the holdings in other federal circuit courts that conditioned the confirmation of an arbitral interim award as a final award on an issue distinct and independent from the controversy on the merits, the Circuit Court confirmed the arbitral temporary award that was the same issue as the controversy to be decided on the merits.

Whether the lower court erred in confirming an arbitral interim award as a final award on an issue that is not distinct, independent and severable from the controversy on the merits.

LIST OF PARTIES

Petitioner Ace/ClearDefense, Inc. ("ACE") is a Canadian corporation located in Ottawa, Canada. Respondent Clear Defense ("CD") is a Virginia State corporation located in Martinsville, Virginia, U.S.A.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14(1)(b) and 29.6, Petitioner Ace/ClearDefense, Inc. makes the following disclosure:

1. Petitioner is not a publicly-held corporation or other publicly-held entity.
2. Petitioner has no corporate parent.
3. None of Petitioner's stock is held by a publicly-traded corporation or other publicly-held entity.

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IN THE

Supreme Court of the United States

No. ___

ACE/CLEARDEFENSE, INC.,

Petitioner,

v.

CLEAR DEFENSE, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ace/ClearDefense, Inc. ("ACDI") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 19, 2002, and amended September 24, 2002, which affirmed the district court's June 27, 2001 order granting the respondent's cross-motion to confirm the interim or preliminary arbitration award, and denying petitioner's motion to dismiss.

OPINIONS BELOW

The September 19, 2002 memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit that gives rise to this Petition is not published in any official citator. It is reprinted in Appendix A hereto ("App. A"). The district court's memorandum order dated June 27,

2001 which granted respondent's cross-motion to confirm the interim arbitration award (reproduced at "App. B") has not been published and is attached hereto. The Court of Appeals' order denying rehearing and rehearing en banc (reproduced at "App. C") is not otherwise published.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1). The United States Court of Appeals for the District of Columbia Circuit issued its decision by way of an opinion dated September 19, 2002, and denied rehearing and rehearing en banc on November 7, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves the alleged unlawful use of a trademark by the Petitioner Ace/ClearDefense, Inc. (hereinafter ACDI), and allegations of fraud and misrepresentation against the Respondent Clear Defense, Inc. (hereinafter CD). CD allegedly manufactures, and markets multi-layered laminated security window film. CD is the owner of the trademark ClearDefense® under which its products are marketed and sold. The ClearDefense® trademark ("the Trademark") was registered in the United States Patent and Trademark office on September 10, 1991, under Registration No. 1656820.

On or about August 14, 1997, Clear Defense entered into a Sales and Distribution Agreement ("the Agreement") with Ace/ClearDefense, Inc. The Agreement allowed ACDI to use the CD trademark ("the Trademark") for the term of the Agreement in connection with its business name, and gave ACDI an exclusive license to promote and sell CD products. According to CD, ACDI breached the Sales Agreement, and

CD terminated the Agreement effective December 1, 1999. ACDI maintains that the Agreement was breached by CD, and that the Agreement was terminated by ACDI.

CD contended that ACDI continued to use the trademark after termination of the Agreement, and as a result, CD demanded arbitration in regard to that issue under the terms of the Agreement. During the interim, CD filed a complaint against ACDI in the United States District Court for the Eastern District of Virginia seeking a preliminary injunction prohibiting the use of the trademark, but ACDI opposed the complaint, and the matter was stayed by the Court pending the outcome of the trial-type arbitration proceeding.

On or about August 4, 2000, the Arbitrator issued a preliminary injunction pursuant to Article 21 of the International Arbitration Rules, which enjoined ACDI from using the "Clear Defense trademark until the arbitration award is issued." In addition, the Arbitrator directed CD "to post a $25,000.00 bond for the pendency of the arbitration." CD was required to post the bond to compensate ACDI "for such damages as it sustains by reason of said preliminary injunction, if the arbitrator finally decides that the said claimant is not entitled thereto . . . ."

CD subsequently published the confidential and private preliminary arbitration injunction on its internet website without obtaining the authorization of ACDI or the Arbitrator.

In November 2000, Petitioner Ace/ClearDefense, Inc. filed a motion to vacate the temporary award in the United States District Court for the District of Columbia, and CD filed a cross-motion to confirm the temporary arbitration injunction. ACDI withdrew its motion to vacate the temporary injunction, and filed a motion to dismiss CD's cross-motion.

On June 27, 2001, the United States District Court issued a memorandum and order granting CD's motion to con-

firm the Arbitrator's August 15, 2000 preliminary injunction. The Court also denied the Petitioner's motion to dismiss the cross-motion.

On July 30, 2001, ACDI filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit from the judgment of the United States District Court. ACDI also filed a motion for reconsideration of the June 27th order with the district court, and on August 28, 2001, the district court denied the motion. Thereafter, this Court issued an order granting the appeal.

On September 19, 2002, the Court of Appeals for the District of Columbia Circuit affirmed the District Court order confirming the interim arbitration award. On November 7, 2002, the Court of Appeals denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit's Decision Conflicts With The 6th And 9th Circuit's Holding In *Island Creek Coal Sales Company V. City Of Gainesville, Florida* And *Pacific Reinsurance Mgmt. Corp. V. Ohio Reinsurance Corp.*, That Conditioned The Confirmation Of An Arbitration Interim Award As A Final Award On An Issue Distinct From The Controversy On The Merits

The issue presented in this Petition governs the controlling law on confirmation of an interim arbitration award in the courts of the United States: whether courts in the United States can confirm an arbitration interim award as a final award on an issue that is not distinct, independent and severable from the controversy on the merits. The D.C. Circuit confirmed the interim award, which is the same issue as the controversy on the merits.

A clarification of this issue will resolve important questions related to the confirmation and enforcement of international and commercial interlocutory arbitration awards.

Contrary to other United States Circuit Court holdings, the United States Court of Appeals for the District of Columbia Circuit held that the district court did not err in confirming the arbitral award despite its interim nature. The Court further stated that "[m]ore important, in this case, the interim award is a preliminary injunction, and confirmation of the injunction is necessary to make relief meaningful." *See*, D.C. Circuit opinion, p. 2, App. A. In its decision, the D.C. Circuit Court confirmed the arbitrator's interim award that was not distinct, independent and severable from the controversy on the merits. The interim award is the same issue as the controversy on the merits.

In this regard, the Petitioner asserts that the Court erred in confirming the interim award that was not separate and distinct from the controversy on the merits.

In *Yasuda Fire & Marine Ins. Co. v. Cont'l Cas. Co.*, 37 F.3d 345 (7th Cir. 1994), and *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991), the Appeals Court stated that "interim relief aimed at preserving assets necessary to make relief meaningful constitutes an 'award' under the FAA." In *Pacific*, *supra*, the court further held that "temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaning...are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA." The D.C. Circuit Court relied on these rulings in deciding the issue in this case.

However, the Court in *Pacific Reinsurance Mgmt. Corp.*, *supra*, at 1023, conditioned the confirmation of an interim award as a *final* award on an issue distinct from the controversy on the merits. *See also*, *Island Creek Coal Sales*

Co. v. Gainesville, 729 F.2d 1046, 1049 (6th Cir. 1984). The Court stated that "[t]he interim award disposes of one self-contained issue, namely, whether the City is required to perform the contract during the pendency of the arbitration proceedings. Th[is] issue is a separate, discrete, independent, severable issue."

In the instant case, the Arbitrator has addressed the substantive issue on the merits as to whether ACDI has continued to use the CD trademark after termination of the contract. This is the very issue raised by CD during the arbitration proceeding and it is the very same issue brought before the United States District Court for the Eastern District of Virginia, during CD's attempt to obtain a preliminary injunction prohibiting the alleged use of the trademark by ACDI. The interim award (a preliminary injunction prohibiting use of the trademark) issued by the Arbitrator is the very same issue that must be decided on the merits during the arbitration trial. More plainly stated, the Arbitrator has preliminarily enjoined ACDI from using the trademark, and must decide whether ACDI has continued use of the trademark after the parties ceased doing business.

This is *not* a separate, discrete, independent, and severable issue from the controversy on the merits. It is a part of and the same issue as the controversy on the merits, namely, whether ACDI has unlawfully continued to use the trademark after termination of the parties' Agreement. The Agreement was terminated by the parties prior to December 1999, and the arbitration proceedings commenced in May 2000. Therefore, any decision regarding use of the trademark after December 1999 directly speaks to the controversy on the merits.

Based upon the *Pacific* and *Island Creek* cases, confirmation of an interim award on an issue that is not distinct and separate from the controversy on the merits is not permitted. In this case, the Appellate Court erred when it confirmed the

trial court's confirmation of the interim award prohibiting the use of CD's trademark during the pendency of the arbitration proceeding surrounding the controversy on whether ACDI has continued to use the trademark after termination of the Agreement. The arbitration proceeding commenced after termination of the contract. Based upon these facts, that issue has been decided.

If a party is able to secure a confirmation order from the district court supporting an [interim] award by an Arbitrator, that party could refuse to continue with arbitration, and refuse to pay arbitration fees, thus preventing the adverse party from attempting to prevail on the merits before the Arbitrator. Thus, the interim award endorsed by the district court could become a final award, should the prevailing party refuse to allow the arbitration to continue once the interim award was endorsed by the district court. In fact, that is very much the situation here.

As a result, Petitioner ACDI respectfully moves the Court to reverse the D.C. Circuit Court's decision in this matter.

II. The Court Of Appeals Erred When It Interpreted The Decision In *Revere Copper And Brass, Inc. V. Overseas Private Investment Corp.*, As A Basis To Conclude That The Language In The Parties' Agreement Which States That It Shall Be Final And Binding Upon Each Party Was Sufficient To Satisfy Section 9's Requirement That The Parties "Have Agreed That A Judgment Of The Court Shall Be Entered Upon The Award."

The language in the parties' Agreement that "the decision of the arbitration shall be final and binding upon each party and may be enforced in any court of competent jurisdiction" was not intended nor did the parties contemplate that such language would apply to an interim decision of the Arbitrator or a preliminary injunction award. Simply stated, the decision of the Arbitrator means a final decision.

In the instant case, the Appeals Court affirmed the trial court's decision based upon the Court's decision in *Revere Copper and Brass, Inc. v. Overseas Private Investment Corp.*, 628 F.2d 81 (1980), which held in part that where the arbitration award drew its essence from the insurance contract, which provided for final and binding arbitration, it was proper to sustain the arbitration award. In *Revere, supra*, the arbitration award was a final award. The *Revere* case did not involve an interim award nor the issuance of a preliminary injunction. ACDI respectfully submits that the Appeals Court's application of the *Revere* case to the facts of this matter is misplaced. Further, the application of *Revere* to the facts of this case is in direct conflict with the controlling case law found in *Lehigh Structural Steel Co. v. Rust Engineering Co.*, 59 F.2d 1038, 1039-40 (D.C. Cir. 1932), which held that an arbitration agreement that merely provided that the arbitrator's award was "binding" was insufficient to satisfy Section 9.

Equally important, ACDI maintains that the *Lehigh* Court would not conclude that an interim decision, one that is not final and binding, would satisfy the requirements of Section 9.

As a result, ACDI maintains that the Appeals Court erred in affirming the decision of the trial court.

III. The Court Of Appeals Erred When It Concluded "That The District Court Did Not Err In Confirming The Award Despite Its Interim Nature Because Section 9 Speaks Of An Arbitration 'Award,' Not A 'Final Award.'"

The Court of Appeals held that "[w]e conclude that the district court did not err in confirming the award despite its interim nature. Section 9 speaks of an arbitration 'award,' not a 'final award.' More important, in this case, the interim award is a preliminary injunction, and confirmation of the injunction is necessary to make final relief meaningful. *See*

Yasuda Fire & Marine Ins. Co. v. Cont'l Cas. Co., 37 F.3d 345, 348 (7th Cir. 1994) (stating that interim relief aimed at preserving assets necessary to make final relief meaningful constitutes an 'award' under the FAA); *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991) (holding that 'temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful . . . are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA').

In the instant case, the Arbitrator's temporary equitable award neither preserved assets, nor performance needed to make a potential final award meaningful, because the contract between ACDI and CD had terminated at least six months prior to the arbitration proceeding, and any potential final award was fully covered and protected by the $25,000.00 mandatory bond posted by CD.

In addition, contrary to the Court's decision, Petitioner ACDI respectfully maintains that the meaning of *award* as stated in 9 U.S.C. Section 9 means *final award* for all purposes including, but not limited to, confirmability, modification, correction and appeal.

9 U.S.C. Section 9 provides in pertinent part that:

> If the parties in their agreement have agreed that a *judgment* of the Court shall be entered upon the *award* made pursuant to the arbitration, and shall specify the court, then at any time within one year the *award* is made any party to the arbitration may apply to the court so specified for an order confirming the *award*, and there upon the Court must grant such an order unless the *award* is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title (emphasis added).

Other courts have held that for purposes of confirmability, that an arbitrator's award must be final. In *Puerto Rico Maritime v. Star Lines Ltd.*, 454 F. Supp. 368 (1978), the

Court held that "[i]t is the general rule with regard to the confirmability of arbitration awards that, in order to be 'final' and 'definite,' the award must both resolve all the issues submitted to arbitration, and determine each issue fully so that no further litigation is necessary to finalize the obligations of the parties under the award. *See, e.g., Cofinco, Inc. v. Bakrie & Bros., N.V.*, 395 F. Supp. 613, 616 (S.D. N.Y. 1975)(Frankel J.) . . . . There is, however, an exception to this rule: if an award is valid in part and invalid in part, and the valid portion concerns claims that are 'separable' from and 'non-dependent' on claims covered by the invalid portion, the valid portion of the award is confirmable, notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration. *Moyer v. Van Dye-Way Corp.*, 126 F.2d 339 (3rd Cir. 1942).

Here, the Arbitrator's preliminary injunction award neither disposed of all the claims, nor was the award separate and non-dependent from the controversy on the merits, namely, whether ACDI continued to use the CD trademark after termination of the Agreement.

In addition, in *John Thompson Beacon Windows, Ltd. v. Ferro, Inc.*, 232 F.2d 366, 367 (D.C. Cir. 1955), the Court held in part that "[w]hen an order deals with a claim which is an ingredient of a cause of action, that is, when it does not decide a collateral issue such as the necessity for giving security for costs, *see, e.g., Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1121, 93 L.Ed. 1528 (1949); *Swift & Co. Packers v. Compania, etc. Caribe*, 339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. 1206 (1950); *United States v. Cefaratti*, 91 U.S. App. D.C. 297, 202 F.2d 13 (D.C. Cir. 1952), to qualify as a 'final decision' it must generally be one which 'disposes of the whole case on its merits.' *Bostwick v. Brinkerhoff*, 106 U.S. 3, 4, 1 S.Ct. 15, 16, 27 L.Ed. 73 (1882), quoted in *Jacobson v. Jacobsen*, 75 U.S. App. D.C. 223, 225, 126 F.2d 13, 15 (D.C. Cir. 1942)."

The Arbitrator's preliminary injunction award prohibiting use of the CD trademark is intertwined with the issue on the merits, namely, whether ACDI continued to use the CD trademark after termination of the Agreement. The interim award is neither dispositive of the case, nor is it separate, distinct and independent of the merits issue.

CONCLUSION

Based upon the arguments set forth above, ACDI respectfully moves the Court to grant its petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2002
(No. 00cv02740)

No. 01-7125

ACE/CLEARDEFENSE, INC.
Appellant,

v.

CLEAR DEFENSE, INC.
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: TATEL and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

JUDGMENT

This appeal from a judgment of the United States District Court for the District of Columbia was considered on the record and on the briefs of counsel. *See* D.C. Cir.R. 34(j). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. Rule 36(b). It is *ORDERED* and *ADJUDGED* that the judgment of the district court is affirmed, substantially for the reasons stated in the district court's memorandum opinion of June 27, 2001.

The appellant contends that the district court erred in confirming an interim arbitration award under the Federal Arbitration Act (FAA), 9 U.S.C. § 9, which authorizes confirmation where "the parties in their agreement have agreed

that a judgment of the court shall be entered upon the award made pursuant to the arbitration." In this case, the parties' arbitration agreement provided: "The decision of the arbitration shall be final and binding upon each party and may be enforced in any court of competent jurisdiction." That language is sufficient to satisfy section 9's requirement that the parties "have agreed that a judgment of the court shall be entered upon the award."

In *Lehigh Structural Steel Co. v. Rust Engineering Co.*, 59 F.2d 1038, 1039-40 (D.C. Cir. 1932), the court held that an arbitration agreement that merely provided that an arbitrator's award was "binding" was insufficient to satisfy section 9. On the other hand, in *Revere Copper and Brass, Inc. v. Overseas Private Investment Corp.*, 628 F.2d 81 (1980), we stated that an agreement that provided that an award "shall be *final and binding* upon the parties" was sufficient. *Id.* At 82 (emphasis added) (internal quotation marks omitted); *see id.* at 84. The agreement in this case goes further than that in either Lehigh or Revere, providing that the arbitrator's award "shall be *final and binding* upon each party *and may be enforced in any court* of competent jurisdiction" (emphasis added).

We also conclude that the district court did not err in confirming the award despite its interim nature. Section 9 speaks of an arbitration "award," not a "final award." More important, in this case, the interim award is a preliminary injunction, and confirmation of the injunction is necessary to make final relief meaningful. *See Yasuda Fire & Marine Ins. Co. v. Cont'l Cas. Co.*, 37 F.3d 345, 348 (7th Cir. 1994) (stating that interim relief aimed at preserving assets necessary to make final relief meaningful constitutes an "award" under the FAA); *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991) (holding that "temporary equitable orders calculated to preserve assets or performance needed to make a potential final

award meaningful . . . are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA").

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 00-2740 (TPJ)

CLEAR DEFENSE, INC.,

Claimant,

v.

ACE/CLEAR DEFENSE, INC.,

Respondent.

American Arbitration Association
Case #: 50T133 00023 00

MEMORANDUM AND ORDER

This case was filed by respondent ACE/Cleardefense ("ACE") on November 14, 2000, as an application to vacate an arbitration award. Claimant Clear Defense, Inc. ("Clear Defense") filed a cross-motion to confirm on November 27, 2000. Subsequently, ACE withdrew its original application to vacate, but Clear Defense's cross-motion remains pending. ACE has opposed Clear Defense's cross-motion and filed a motion to dismiss.

I.

The underlying dispute in this case concerns the allegedly unlawful use by ACE of Clear Defense's registered trademark (the "Trademark"). Clear Defense makes single layer and multi-layered laminated security window film that, when applied to glass, makes the glass shatter-resistant. In 1997, Clear Defense entered into a Sales and Distribution Agreement (the "Agreement") with ACE allowing ACE to

use the Trademark for the term of the Agreement. When ACE failed to meet certain minimum sales goals, Clear Defense terminated the Agreement, effective December 1, 1999. The Agreement required ACE at termination to stop all further use of the Trademark in the conduct and name of its business. ACE continued to use the Trademark, however, and Clear Defense demanded arbitration under the terms of the Agreement.

In the arbitration proceeding, Clear Defense moved for a preliminary injunction pursuant to Article 21 of the International Arbitration Rules, which provides:

> (1) At the request of any party, the tribunal may take whatever interim measures it deems necessary including injunctive relief and measures for the protection or conservation of property; (2) such measures may take the form of an interim award and the tribunal may require security for costs of such measures.

On August 15, 2000, the arbitrator issued a Determination on Claimant's Application for a Preliminary Injunction in which she ordered ACE "preliminarily enjoined from using the Clear Defense trademark until the arbitration award is issued" and required Clear Defense to post a $25,000 bond. *See* Arbitral Award at 15-16.

Clear Defense moves to confirm the August 15, 2000 arbitration award pursuant to 9 U.S.C. §9. ACE opposes the motion and seeks to dismiss the motion on the grounds that (1) the underlying contract does not provide that a judgment may be entered on an arbitration award as required for confirmation under 9 U.S.C. §9; and (2) the arbitration award at issue is an interim award, and 9 U.S.C. §9 contemplates confirmation of final awards.

II.

The Federal Arbitration Act provides:

> [i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. §9. The arbitration award was issued on August 15, 2000 in Washington, DC, thus this Court is the proper district in which to bring a confirmation action. *See* Application to Vacate at 3.

The Agreement between the parties provides that:

> [a]ny controversy, dispute or claim arising out of or relating to this Agreement or the breach thereof that cannot be amicably settled by mutual negotiations shall be finally settled by arbitration in Richmond, Virginia, U.S.A. in accordance with the rules of the American Arbitration Association. The decision of the arbitration shall be final and binding upon each party and may be enforced in any court of competent jurisdiction.

Agreement, Art. 22, p. 10. ACE urges that this language is insufficient to permit a court to confirm an arbitration award under 9 U.S.C. §9. ACE cites a Court of Appeals of the District of Columbia case finding that "the arbitration agreement here in question contained no agreement for confirming any award by judgment of any court, summary or otherwise; the plaintiff relying for his statutory jurisdiction

entirely upon the phrase of the arbitration agreement that an award thereunder should be binding." *Lehigh Structural Steel Co. v. Rust Eng'g Co.*, 59 F.2d 1038, 2039 (D.C. Cir. 1932), *cert. denied*, 287 U.S. 626 (1932). In *Lehigh*, a provision that an arbitration award was "binding" was held to be insufficient to meet the requirements for a court to confirm an award under 9 U.S.C. §9. ACE argues that in the instant case, the parties did not expressly agree to entry of a judgment, thus this Court lacks jurisdiction to confirm the interim arbitration award under 9 U.S.C. §9.

However, in a more recent case, the D.C. Circuit affirmed the enforcement of an arbitration ward under 9 U.S.C. §9 when the contractual language provided "that any disputes thereon 'shall be settled by arbitration . . . (and) . . .(t)he award rendered by the arbitrator shall be final and binding upon the parties." *Revere Copper & Brass Inc. v. Overseas Private Investment Corp.*, 628 F.2d 81, 82 (D.C. Cir 1980). The D.C. Circuit held that "Section 9 of the [Federal Arbitration] Act expressly provides for the confirmation of arbitration awards which arise out of the kind of binding arbitration clause which is present in Revere's contract with OPIC." *Id.* at 84. The arbitration clause in the Agreement provides that "the decision of the arbitration shall be final and binding upon each party," the same language found sufficient under 9 U.S.C. § 9 by the D.C. Circuit in *Revere Copper*.[1] The Agreement also provides that the arbitration award "may be enforced in any court of competent jurisdiction." As a whole, the language of the arbitration clause in the Agreement is considerably stronger than the phrase that the arbitration shall be "binding" found inadequate in *Lehigh*.

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[1] Other circuits have found also the language "final and binding" sufficient to confer authority on a district court to confirm an arbitration award even in the absence of an explicit provision for the entry of judgment on an award. *See Booth v. Hume Publ'g, Inc.*, 902 F.2d 925 (11th Cir. 1990).

Moreover, ACE appears to have fully participated in the arbitration process. The Court also observes that ACE's original application to vacate the arbitration award states: "[t]he arbitration agreement provides that judgment may be entered by a court of competent jurisdiction upon an award made pursuant to arbitration under the agreement," in effect conceding that the requirements of 9 U.S.C. § 9 are met and the Court has authority to enter judgment on an award. *See* Application to Vacate, ¶ 9.

Accordingly, the Court concludes that it has authority under 9 U.S.C. § 9 to confirm the arbitration award.

III.

Next, the Court considers whether the temporary nature of the August 15, 2000 arbitration award renders it inappropriate for confirmation. The D.C. Circuit has not spoken to whether a temporary arbitration award can be confirmed."[2] Other circuits have noted that certain interim orders "may be essential to preserve assets or enforce performance which, if not preserved or enforced, may render a final award meaningless." *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1022-23 (9th Cir. 1991). The Ninth Circuit held that "temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful,. . . , are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA." *Id.* at 1023.

In this case, the preliminary injunction award was made pursuant to Article 21 of the International Arbitration Rules,

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[2]ACE argues that a final decision "must generally be one which 'disposes of the whole case on its merits.'" *John Thompson Beacon Windows, Ltd. v. Ferro, Inc.*, 232 F.2d 366, 367 (D.C. Cir. 1955) (internal citations omitted). *John Thompson* concerns when an order is a "final decision" for purposes of appeal, not for purposes of confirmation of an arbitration award, so the case is inapposite.

which provides that "[a]t the request of any party, the tribunal may take whatever measures it deems necessary including injunctive relief and measures for the protection or conservation of property." Arbitral Award at 1. Thus, the arbitration award at issue here falls within the scope of temporary equitable awards that other circuits have found confirmable, and the Court concludes that the arbitration award can be confirmed.

For the foregoing reasons, it is, this 27th day of June, 2001,

ORDERED, that Clear Defense's cross motion to confirm arbitration award [5] is granted; and it is

FURTHER ORDERED, that ACE/Cleardefense's motion to dismiss [8] is denied; and it is

FURTHER ORDERED, that the August 15, 2000 arbitration award is confirmed.

Thomas Penfield Jackson
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2002
(No. 00cv02740)

No. 01-7125

CLEAR DEFENSE, INC.,
Appellee,

v.

ACE/CLEAR DEFENSE, INC.,
Appellant.

Consolidated with 01-7153

BEFORE: Ginsburg, *Chief Judge*, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, *Circuit Judges*, and Williams, *Senior Circuit Judge*.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk